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IN THE

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. 291

UNITED MINE WORKERS OF AMERICA, *Petitioner*,

v.

RIVERSIDE COAL COMPANY, INC.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDWARD L. CAREY
HARRISON COMBS
WILLARD P. OWENS
900 Fifteenth Street, N. W.
Washington, D. C.

ALBERT W. SPENARD
Madisonville, Kentucky

E. H. RAYSON
Valley Fidelity Bank Building
Knoxville, Tennessee

*Attorneys for United Mine Workers of America*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner, United Mine Workers of America, (called "UMW" herein), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit,[1] entered April 4, 1969, in the case numbered 18,293, styled Riverside

[1] Called "Sixth Circuit" herein.

Coal Company, Inc., plaintiff-appellee[2] v. United Mine Workers of America, defendant-appellant, affirming the judgment entered September 11, 1967 by the United States District Court for the Western District of Kentucky, Owensboro Division,[3] against United Mine Workers of America and in favor of Riverside for $20,000 and costs (41a).[4]

A certified transcript of record in said case, with the proceedings in the Sixth Circuit is furnished herewith, in accordance with this Court's rules.

## OPINIONS BELOW

The Sixth Circuit's opinion appears in Appendix A to this Petition (pp. A19-35); and in the certified transcript of record. The opinion is not officially reported but is unofficially reported in 70 LRRM 3215 and 59 CCH Labor Cases ¶ 13,401.

The District Court's memorandum appears in Appendix A to this Petition at pp. A1-18; and in the certified joint appendix at pp. 23a-41a. The memorandum is not reported.

## JURISDICTION

The Sixth Circuit's judgment was entered April 4, 1969. This Court's jurisdiction is invoked under 28 USCA § 1254(1) and 2101(c).

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[2] Called "Riverside" herein.

[3] Called "District Court" herein.

[4] Page references with the suffix "a" are to the certified joint appendix, as filed in the Court of Appeals, one certified copy of which is filed with this Petition. References to the Appendix to this Petition are indicated by the symbol "A".

## BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Jurisdiction of the District Court was based upon Section 303 of the Labor Management Relations Act, 1947[5] (29 USCA 187) and upon the theory of pendent jurisdiction, by which it was found the District Court had jurisdiction to determine Riverside's alleged state law cause of action.

## QUESTIONS PRESENTED

1. In a primary strike with picketing at the entrance to the primary employer's premises may a finding of secondary boycott violative of Section 303, Labor Management Relations Act, 1947, be based on isolated acts of unknown persons away from the premises, directed against "independent" truckers performing work directly related to the employer's normal production operations?

2. In an action for damages against a labor union in which the Norris LaGuardia Act's "clear proof" rule is applicable, is "clear proof" of union authorization of threats and acts of violence established by evidence of acts of a union representative whose authority was merely to organize employees and process their grievances, or by evidence of isolated acts of unknown and unidentified persons?

3. May the total losses sustained in consequence of an economic strike be awarded as damages where the strike was carried on for a lawful purpose, and, except for isolated threats and acts of violence, in a lawful manner?

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[5] Herein called "Act".

## STATUTES INVOLVED

The statutory provisions involved are Section 6, Norris-LaGuardia Act, 29 USC § 106, Act of March 23, 1932, 47 Stat. 70; Section 301(e), Labor Management Relations Act, 1947, 29 USC § 185(e); and Section 303, Labor Management Relations Act, 1947, prior to its amendment in 1959, 29 USC § 187, Pub. L. No. 101, 80th Cong., 1st Sess., 1947, 61 Stat. 136. These statutory provisions are set forth in Appendix A hereto.

## STATEMENT OF THE CASE

Riverside, a Kentucky corporation, sued UMW under Section 303 and state law for damages allegedly sustained in a 1959 strike (3-7a, 8-10a, 17-20a). Upon issues joined (11-15a, 15a-16a, 21a) the case was tried to the Court without a jury. The District Court found violations of both federal and state law and directed entry of judgment of $20,000 (23a-41a). Judgment was entered accordingly (41a).[6]

On appeal the Sixth Circuit affirmed the judgment as entered (p. A34).

## STATEMENT OF THE EVIDENCE

### I

James Jessup operated a strip coal mine in Muhlenberg County, Kentucky, as a proprietorship, Jessup Coal Company, from 1957 until October 1958, under a UMW agreement.

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[6] James Jessup, principal Riverside stockholder, and proprietor of Riverside's predecessor in interest, Jessup Coal Company, was also a plaintiff in the action. Jessup's action, based on two earlier disputes, was dismissed by the District Court. No appeal was taken from that dismissal, hence except as evidence of the earlier disputes relates to the Riverside dispute, Jessup's action is no longer material.

In October 1958, Jessup incorporated his business as Riverside Coal Company, Inc. and assigned a lease (the "Mercer-Moore Lease") to Riverside.[7] Subsequently, Riverside operated on the premises of the assigned lease, also in Muhlenberg County, with the same equipment formerly used by Jessup and "part" of the Jessup employees (459a).

Riverside contended it was not bound by the Jessup-UMW agreement then still in effect (75a), but subject to termination on 60 days' notice. UMW gave notice of termination which became effective in early March 1959, and pending termination urged Riverside to enter into a new agreement. Riverside declined for economic reasons and the strike which ensued led to the present litigation (A11-12).

The strike commenced on April 16 with Riverside pit employees picketing at the mine entrance. As the strike continued the pickets were joined from time to time by field representatives from UMW's District office, as well as numerous other miners from the area. The picketing continued until mid-May. Riverside ceased operations at its Pond Creek site sometime in June or July and reopened in nearby Ohio county (80a, 99a, 101a).

The District Court found that during the strike there were violations of both Section 303 and Kentucky common law, for which UMW was legally responsible. The District Court further found these violations damaged Riverside in the amount of $20,000. The Sixth Circuit, Circuit Judge Edwards dissenting, found the District Court's finding not clearly erroneous, and affirmed.

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[7] The incorporation of Jessup's business followed institution of suit by the UMW Welfare and Retirement Fund against Jessup for unpaid royalties totalling $21,407.60, which the Fund eventually recovered. As found by the District Court, Jessup had misrepresented the extent of his obligation in his periodic reports to the Fund (24a).

**The Evidence of Secondary Boycott**

The Sixth Circuit correctly found, on the authority of *United Steelworkers* v. *NLRB*, 376 U.S. 492, and *Local 761, Elec. Workers* v. *NLRB*, 366 U.S. 667, that the picketing at Riverside's mine entrance was clearly "primary activity" and not violative of Section 303 "even though this entrance was used by *independent* truckers as well as regular employees of the mine."

The Sixth Circuit, however, found secondary activity from what it termed "threatening and violent conduct away from the primary site", directed against "neutral secondary parties".[8] This finding was expressly based on testimony of two "independent" truckers who hauled Riverside's coal (A28). One of these, Raymond Bethel, testified of being awakened at his home, some distance from the mine, by loud noises that sounded like "firecrackers". He also testified that car loads of men yelled at him as they passed his home. (165a-173a).[9] The other, Robert Sutton, testified that as he was driving his truck home after work on one occasion he was shot from ambush by an unknown assailant (207a-214a).

Bethel and Sutton and the other truck drivers were stipulated to be "independent", i.e., they were not on Riverside's payroll (174a). The method employed by Riverside with respect to the truck drivers varied from time to time, but essentially it was to hire a truck owner, who would himself drive the truck (Bethel and

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[8] The District Court found a violation of Section 303 but did not refer to the evidence on which it based its finding.

[9] Bethel testified that he thought the car that carried the men who yelled at him belonged to Arthur Chan[illegible], a UMW representative, but he "could not swear he was driving it." (168a)

Sutton were of this type) or hire someone to drive, to haul the coal for a fixed amount per ton. During the period in question Riverside's mine foreman also served as the trucking contractor. The truckers performed a normal part of Riverside's operation—the hauling of coal from mine to preparation plant. Though the truckers and the Riverside miners performed a unified production operation, the truckers were deemed "neutral" by the Sixth Circuit (A28-29).[10]

The Bethel and Sutton incidents, the Sixth Circuit found, "were clearly violative of Section 303" (A29).

**The Clear Proof of UMW's Responsibility**

During the strike UMW field representatives were present from time to time at the picket line at the Riverside mine entrance. These men were *admittedly* "agents" of the union with authority to conduct organizational work.

The District Court found one of the field representatives made "threats of violence" against Riverside and its truckers. Field Representative Chaney was found to have told a state trooper (after mine owner Jessup attempted to run him down with an automobile) that if the trooper didn't do something about it, "they would take the law into their own hands". It was also found that Chaney threatened pit employees, saying, "we will get you . . . if we don't get you down

[10] Even apart from relationship apparent from the unified operation, the finding that the truckers were neutral is challenged by the fact that the neutral truck operators included a Riverside employee (59a), the Riverside foreman (174a-175a) and Jessup himself (176a). A paradox of the Sixth Circuit's decision is that Jessup, Riverside's principal owner, was a primary employer and a "neutral" secondary employer at the same time!

here we will get you on the way home. You will never eat supper at home tonight" (A3-4). From this evidence the District Court found a violation of state law, saying "there is clear and substantial proof to establish agency so as to hold the union responsible for the wrongful acts of these officers . . ." (A4). The District Court did not comment on either the applicability or requirements of Section 6 of the Norris-LaGuardia Act in its memorandum and this was the basis for one of UMW's assignments of error before the Sixth Circuit.

The Sixth Circuit affirmed on the basis of the conduct of the field representative referred to above. The Sixth Circuit acknowledged the applicability of Section 6, but noting the evidence referred to above, it said "UMW's agents were actually involved in the threats of violence which took place" (A25-26). Without discussion of the field representatives' authority to commit such acts, and without pointing to any evidence that the particular acts complained of, or acts of that character, had been authorized by UMW, the Sixth Circuit concluded thusly (A26):

> "In view of the authorities and the evidence, UMW must be said to have 'participated in' or 'actually authorized' the acts of its appointed agents charged with the extension of the 1958 Amendment."

It is not clear from the opinion that the Sixth Circuit based its finding of state law violation on the acts of unknown persons away from the picket line. It is implicit, however, that the Sixth Circuit did so, for it noted (A33), "the record is replete with incidents of violence and threats of violence"; and that ". . . violence was involved in both primary and secondary

activities and the consequences were inseparable." (A33, footnote 5 to the opinion).

**The Evidence of Damages**

The District Court awarded compensatory damages of $20,000.[11] It based the award on lost profits and the value of a lease Riverside surrendered but did not allocate specific amounts to either factor. No explanation of how the amount was arrived at is found in the opinion.

The District Court stated that the "proof of damages . . . leaves much to be desired" (A17). The Sixth Circuit, however, in affirming the award, found the evidence "sufficient to support an award in excess of that allowed by the District Court" (A32).

Circuit Judge Edwards, believing the evidence failed to sustain the action under Section 303, would have remanded for computation of damages resulting only from state law violations (A35).

With respect to an allowance for the loss of profits the District Court found the evidence insufficient to show earnings for Jessup Coal Company prior to the organization of Riverside. It termed Riverside's estimates for future earnings "gross speculation based on entirely false assumptions" (A15). It described them "far too speculative and remote to be recoverable" (A16). The District Court noted that Riverside's accountants calculated a profit of $36,860 for the period beginning November 1, 1958, and ending April 30, 1959, but further noted that the accountants failed, without "any sound basis" to apportion certain

[11] The District Court denied punitive damages, saying, "Jessup's provocative acts of violence cannot be excused" (A18).

expenses to that period. Evidence offered by UMW was to the effect that had proper expenses been allocated to that period a loss rather than a profit would have been sustained. The District Court evidently struck a balance in allocating these expenses, though it did not explain how it did so, and awarded damages for loss of profits accordingly (A13-17). *The District Court, however, did not in any manner undertake to apportion any of the losses sustained by Riverside which resulted from the manifestly legal element of the dispute, that is, the losses sustained by reason of the lawful aspects of the picketing and the refusal of its employees to work under terms not acceptable to them.*

In considering the value of the lease which Riverside surrendered, the District Court rejected as a "hyperbolic figure" Riverside's estimate of its value at seven million dollars (A14-15). The District Court did assign a small value to the lease, however, in that it was subsequently assigned to another, Herman Genet, Inc. Genet paid four thousand dollars for the lease, but even Genet, with equipment larger than Riverside's, determined the property could not be profitably mined. The lease did not become profitable until five years later when it was subleased by Genet to an operator with equipment far more extensive than either that of Genet or Riverside (A13-17).

## REASONS FOR GRANTING THE WRIT

### QUESTION ONE

The Sixth Circuit's approval of the District Court's finding of violation of Section 303 on the basis of responsibility for the acts of unknown persons conflicts with this Court's decision in *United States* v. *White*, 322 U.S. 694, with that of the Court of Appeals for the District of Columbia in *International Ladies Garment*

*Workers Union* v. *NLRB,* (D.C. Cir., 1956), 237 F.2d 545, and with numerous decisions of the National Labor Relations Board, and constitutes an improper implementation of the agency requirements of Section 301(e) of that Act. Its finding of violation of Section 303 based on isolated acts away from the situs of the dispute directed against persons performing a regular part of the primary employer's production operation, is also in conflict with this Court's decisions in *United Steelworkers* v. *NLRB,* 376 U.S. 492 and *Local 761, Elec. Workers* v. *NLRB,* 366 U.S. 667; and with the decision of the Court of Appeals in *Local 24, International Brotherhood of Teamsters* v. *NLRB,* 266 F.2d 675 (D.C. Cir., 1959).

*The Agency Issue.* A purpose of Taft-Hartley's Section 301(e) was to remove the burden of Section 6 in suits under that Act and in NLRB proceedings. *United Mine Workers* v. *Gibbs,* 383 U.S. 715. Its purpose was to restore, in those proceedings, "ordinary doctrines of agency". *Id.* p. 736.

Congress did not mandate, however, that union responsibility could be imputed in the absence of evidence of agency. Section 301(e) makes the existence of the agency relationship, though not its scope, the central issue.[12] Though Section 6 does not apply, some standard of proof is nevertheless required. Review of the Sixth Circuit's decision is warranted to establish that standard and thus implement an important aspect of national labor policy.

The significance of the instant case is that agency findings were made in the absence of evidence and on the basis of speculation. Indeed, the Sixth Circuit, in finding a Section 303 violation, predicated its decision

[12] Section 301(e) is set forth at page A38, Appendix A herein.

on acts of unknown persons on which the District Court did not state a reliance.

An inference of agency may not be drawn from the fact of membership in a union, *United States* v. *White,* 322 U.S. 694, *International Ladies Garment Workers Union* v. *NLRB,* 237 F.2d 545 (D.C. Cir., 1956). Hence it follows that no such inference may be drawn from evidence of an act of an unknown person which occurs during a dispute, even if it is assumed that that person was a union member.

The Sixth Circuit's decision is plainly at odds with those of the NLRB. The Board has ruled that even a member's prominence in an organizing campaign is not "sufficient to establish an agency". *Electric Wheel Company,* 120 NLRB 1644, 1647 (1958).

Similar decisions abound. The Board said in *National Union of Marine Cooks and Stewards,* 87 NLRB 54, 75 (1949) where two men were beaten in the course of a labor dispute by unidentified assailants: "The testimony suggests that some members of the Respondent union may have committed the assault . . ., but that is mere speculation. Under these circumstances I do not feel warranted in finding the Respondents responsible for the assault on (the two men)". And in *Lumber and Sawmill Workers Union,* 87 NLRB 937, 940-941 (1949), the Board said, "There is absolutely no evidence to connect the Respondent with Knights' [the alleged agent] action. A suspicion is not evidence, nor is it a substitute for proof." In *Blue Ridge Coal Corp.,* 129 NLRB 146 (1960), the Board refused to find UMW liable for an assault, saying:

> "This incident occurred more than a mile distant from the entrance to the Marra Brothers mine,

> and Williams was unable to identify any of the men present. Under these circumstances, and particularly in view of the facts that there was no union agent present who might have repudiated the threat and no evidence that the men who made the threat were pickets, we do not attribute responsibility for this incident to the Respondents."

The Sixth Circuit did not explain its basis for decision on this issue. Quite obviously, however, its sweeping approach is at complete variance with that followed in the above decisions.

*The Boycott Issue.* The primary nature of the strike and picketing is clear and was acknowledged by the Sixth Circuit. The Sixth Circuit, however, found incidents at the homes of two truck drivers secondary in nature, and warranted the finding that UMW violated Section 303.

The agency question aside, UMW contends that the isolated nature of this conduct and the absence of inducement to concerted conduct of the type Congress sought to proscribe in enacting Section 303, make the conclusion inapposite and erroneous. To find this conduct secondary rather than, at most, a part of the primary dispute, and thus permit the prosecution of this state law action in federal court under *Gibbs'* pendent jurisdiction doctrine, is surely to have the tail wag the dog. The equivalent of the conduct here involved was before this Court in *NLRB* v. *International Rice Milling Co.,* 341 U.S. 665 (1951). As in *Rice Milling,* here the inducements were:

> "not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of Section 8(b)(4), and they do not here."

Plainly the instant case is at odds with the *Rice Milling* decision.

The finding of violation of Section 303 is further erroneous for the reason that the truckers, while "independent", which is to say they were not on Riverside's payroll, were not "neutral" within the contemplation of Section 303. Congress, in enacting Section 303, sought to protect employers "wholly unconcerned", but did not seek to shield an employer "acting as a part of the primary employer."[13] This Court implemented the purpose of the statute, as thus confined, in *Local 761, Elec. Workers* v. *NLRB,* 366 U.S. 667, where it held that subcontractors performing a normal part of the primary employer's operation was not entitled to insulation from the primary dispute.

The truckers here involved are plainly of this character. They were hired to perform an integral part of

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[13] During the debate on Section 303 Senator Taft explained that the provision "makes it unlawful to resort to a secondary boycott to injure the business of a third person *who is wholly unconcerned* in the disagreement between the employer and his employees." (93 Cong. Rec. 4323; emphasis ours.)

Senator Taft was questioned as to the application of the provision in a situation where a dress manufacturer has his cut goods sent to contractors whose workers sew and complete the dresses according to the manufacturer's specifications, with the dresses then returned to the manufacturer for sale. Senator Taft reasoned that the provision would have no application. He said (95 Cong. Rec. 8709):

> "Mr. President, the secondary boycott ban is merely intended to prevent a union from injuring a third person who is not involved in any way in the dispute or strike, and, therefore, should not suffer economic damage simply because of the action of a labor union. It is not intended to apply to a case where the third party is, *in effect in cahoots with or acting as a part of the primary employer.*" (Emphasis ours.)

a straight line operation. In every relevant sense they acted "as a part of the primary employer."

The Sixth Circuit, in *United Mine Workers* v. *Osborne Mining Company,* 279 F.2d 716 (1960), cert. denied, 364 U.S. 881, found similar truckers independent and neutral. Its decisions in *Osborne* and here, however, are in conflict with *Local 24, International Brotherhood of Teamsters* v. *NLRB,* 266 F.2d 675 (D.C. Cir., 1959), which involved a similar trucking operation. The *Teamsters* decision rejected solution of the issue by a "legalistic word or phrase" such as "independent contractor", and found in the comparable realities of that case that the independent truck owners were not neutral employees. The decision thus gave full recognition to the view we insist is correct. The conflict in these decisions is further basis for review by this Court.

**QUESTION TWO**

The affirmance of the District Court's judgment was based on the Sixth Circuit's conclusion that "the requirements of Section 6[14] have been met as to the common law claim" (A26). This conclusion was in turn based on the finding that "UMW's agents were actually involved in the threats of violence which took place" (A25-26).

The underlying facts upon which this finding is predicated are statements made by a field representative, detailed above, charged with the duty of unionizing

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[14] Section 6 reads thus:

"No officer or member of any association or organization and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

mines in UMW's District 23 and extending the union agreement. There was no evidence of any additional authority in the field representative and specifically there was no evidence that defendant union as an entity authorized or participated in any of the alleged unlawful conduct of the character charged either by way of an express grant of authority or by custom or traditional practice. There was, in fact, an absence of such evidence.

The Sixth Circuit's judgment, thus viewed, conflicts with this Court's decisions in *United Brotherhood of Carpenters* v. *U.S.*, 330 U.S. 395 and *United Mine Workers* v. *Gibbs*, 383 U.S. 715.

The Sixth Circuit correctly held that the requirement of Section 6 was applicable to Riverside's common law claim. The District Court's opinion was silent on this issue but it is clear that it did not apply Sec. 6. The District Court did find "clear and substantial proof to establish agency" (A4), but the fact of agency was not an issue. The agency status of UMW field representatives was admitted. *The issue was what standard of responsibility should be applied in determining the responsibility of UMW —under Section 6—for the conduct of its agents for an alleged violation of state law.*

This Court has made clear that mere proof of agency to perform lawful acts in furtherance of the lawful activities of a union does not suffice, under Section 6, as a basis to impose liability on a union for the wrongful acts of that agent. A requirement beyond the normal requirements of agency was the purpose of Section 6. In *Carpenters* it was explained thusly (330 U.S. 395, 406-7):

> "... We are of the opinion that the requirement of 'authorization' restricts the responsibility or

liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or their officers or members who actually participate in the unlawful acts, *except upon clear proof that the particular act charged, or acts generally of that type and quality had been expressly authorized,* or necessarily followed from a granted authority, by the association or nonparticipating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence." (Emphasis ours)

The conflict with the instant decision is manifest. Absent any evidence on the issue posed by the underscored language in *Carpenters* quoted above, the Sixth Circuit found bare evidence of agency sufficient. It is impossible to resolve the decision in the case at bar and the *Carpenter's* decision.[15]

The Sixth Circuit construed *Gibbs* to mean that a union is unconditionally liable for the acts of its agents, without regard to any evidence that the union actually authorized its agents to commit those acts. This interpretation is erroneous. In *Gibbs* there was an absence of evidence of the agent's involvement in wrongful acts, hence the issue of his authority to have

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[15] The Sixth Circuit stated that "UMW must be said to have participated in' or 'actually authorized' the acts of appointed agents". (A26). In our view the finding of "participation" is inapposite, for if there is an absence of evidence of authorization, what the individual did could not be construed as "participation" on UMW's part. Authorization is the issue. Obviously if participation without authorization suffices the decision in *Carpenters* is quite meaningless.

committed them was never reached. But that the breadth of authority is an issue is the clear mandate of Section 6 and the precise ruling in the *Carpenters* case.

The Sixth Circuit's decision also held UMW responsible, under Section 6, for the acts of unknown persons. What we have stated above answers that determination, for if Section 6 requires "clear proof" of union's actual authorization of the unlawful acts surely it precludes liability for the acts of unknown persons.

The driving force behind Section 6, as this Court stated in *Gibbs,* was the fear that unions might be destroyed if they could be held liable for acts beyond their practical control. It categorically rejected the concept of conspiracy which characterizes the approach of the Sixth Circuit in the case at bar.

The increasing frequency of common law actions for damages against unions in the federal courts warrants review of this decision to the end that the appropriate standard of proof in such cases, and the proper application of that standard, will be followed by these courts as set forth by the decisions of this Court.

**QUESTION THREE**

In affirming the District Court's award of compensatory damages for loss of profits without allowance for losses which resulted from the legal aspects of the dispute, the Sixth Circuit's decision conflicts with the decisions of this Court in *United Mine Workers* v. *Gibbs,* 383 U.S. 715, *Teamsters Local 20* v. *Morton,* 377 U.S. 242, *Youngdahl* v. *Rainfair, Inc.,* 355 U.S.

131 and *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236. And in awarding damages attributable to the remote consequences of the dispute in terms of the future value of a lease, the decision conflicts with *United Mine Workers* v. *Gibbs, supra.*

The fact that disorder may occur in the course of a labor dispute does not entitle an employer to recover all losses sustained as a consequence of that dispute. Recovery may be had only for the direct consequences of wrongful conduct and *Gibbs* teaches that this "does not include consequences resulting from associated peaceful picketing or other union activity", 383 U.S. 715, 729. To be sure, the District Court states that Riverside sustained damages "by reason of the defendant's wrongful conduct in the sum of $20,000" (A17) But, as we have shown, what the District Court did in fact was not to predicate an award on damages which flowed from unlawful acts but was to award damages based upon an estimate of Riverside's *total* losses. Neither the District Court nor the Court of Appeals considered the consequences of the lawful activity of the strikers on the business of Riverside, and their decisions cannot be construed to have taken the consequences of the lawful aspect of the dispute into account. The concept of thus awarding damages based on the totality of losses was rejected by the *Gibbs* decision.[16]

The award of damages affirmed by the Court of Appeals further conflicts with *Gibbs* and the other decisions cited above in that the award in fact grants unto the plaintiff damages which are speculative and remote. This is apparent from the award of damages

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[16] See *Review of Developments in Labor Damage Suits,* Mozart G. Ratner, 63 Labor Relations Reporter (BNA) 311.

for the loss of a lease without value at the time of its surrender and of value years later only under entirely different operating circumstances. *Gibbs* requires that damages be "strictly confined" to the "direct consequences" of the tort. It does not permit the recovery of remote and speculative damages upon evidence which described by the District Court itself as "leaving much to be desired".

Review of the Court of Appeals' decision is warranted because of the conflicts in that decision and the above decisions of this Court to the end that a proper standard of the determination of damages in these cases may be made clear.

## CONCLUSION

Petitioner prays that this petition for Writ of Certiorari be granted and that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals entered in case No. 18,293 on April 4, 1969.

Respectfully submitted,

EDWARD L. CAREY
HARRISON COMBS
WILLARD P. OWENS
900 Fifteenth Street, N. W.
Washington, D. C.

ALBERT W. SPENARD
Madisonville, Kentucky

E. H. RAYSON
Valley Fidelity Bank Building
Knoxville, Tennessee

*Attorneys for United Mine Workers of America*